165-370

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 173.

THE BURLINGTON GAS LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED SEPTEMBER 24, 1894.

(15,689.)

respectfully prays that its petition for a rehearing in said cause may be granted.

The Lake Shore and Michigan South-
ern Railway Company,
By GEO. C. GREENE.
General Counsel.

165-370

165-370

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 173.

THE BURLINGTON GAS LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED SEPTEMBER 24, 1894.

(15,689.)

(15,689.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 173.

THE BURLINGTON GAS LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

	Original.	Print.
Caption	*a*	1
Appellant's abstract of record	1	1
Petition	2	1
Answer	3	2
Exhibit A—Agreed facts	8	5
Map marked Exhibit B offered (see page 31)	11	6
Testimony of Wm. Steyh	11	7
W. A. Kendall	11	7
Wm. Steyh (recalled)	11	7
E. D. Cleary	13	8
Richard Spencer	14	9
W. A. Kendall	14	9
Proceedings of city council	15	9
Photograph marked Exhibit E offered (see page 30)	17	10
Record in case City of Burlington *vs.* B., C. R. & N. R'y Co.	17	10
Petition	17	11
Answer	18	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 26, 1896.

	Original.	Print
Agreement between City of Burlington and B., C. R. & N. R'y Co., August 10, 1868	19	12
Demurrer	22	14
Answer and cross-bill	22	14
Agreement	24	15
Decree	25	16
Decree	26	17
Notice of appeal	28	18
Exhibit E—Photograph	30	18
B—Map showing accretions	31	18
Submission	32	18
Opinion	33	18
Decree	39	21
Petition for writ of error	41	22
Writ of error	42	23
Bond	43	23
Assignment of errors	44	24
Citation and acceptance of service of same	48	26
Clerk's certificate	49	26

a Pleas before the supreme court of Iowa in a cause therein tried and determined between The Burlington Gas Light Company, pl'ff (appellee), and The Burlington, Cedar Rapids & Northern Railway Company, def't (appellant).

Be it remembered that on the 27th day of May, 1893, there was filed in the office of the clerk of the supreme court of Iowa by the defendant railway Co. a printed abstract of record, the same being in words and figures as follows:

1 Filed May 27, 1893. G. B. Pray, clerk of supreme court.

In the Supreme Court of Iowa, October Term, 1893.

THE BURLINGTON GAS LIGHT COMPANY, Appellee,
vs.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Appellant.
} Equity.

Appeal from the Des Moines county district court.

Hon. James D. Smyth, judge.
Smyth, Rumple & Lake for appellee.
S. K. Tracy for appellant.

Appellant's Abstract.

2 December 1st, 1892, plaintiff filed the following petition, viz:

Petition in Equity.

In the District Court of Iowa in and for Des Moines County, January Term, 1893.

1. Plaintiff states to the court that it is a corporation created and existing under the laws of Iowa, and that the defendant is a like corporation.

2. That the plaintiff is the owner of lots Nos. 66, 67, 68, 69 and 70, in the city of Burlington, extending from High street to Arch street, and fronting upon what is known as "Front street" in said city. That said Front street extends from the easterly line of said lots to the Mississippi river, being the strip of ground reserved by the act of Congress by which said city of Burlington was originally laid out, and being reserved for public use as therein shown.

3. That the plaintiff purchased its lots many years ago, and has erected thereon large and valuable improvements, consisting of buildings, machinery and other appliances for the manufacture of illuminating gas, the most of its houses and improvements fronting on said Front street.

4. That said buildings were erected accordingly to and in view of the grade of said Front street as established by the city of Bur-

lington, and that said lots are on an even grade with the surface of said street.

5. That said defendant is now engaged in changing the actual physical grade of said street, by cutting the same down in front of plaintiff's property many feet, so as to render access to the lots of plaintiff by that street difficult; and the same is being done without having proceeded in any manner by law to change said grade, and without paying or proposing to pay the plaintiff anything as damages by reason thereof.

3 6. The plaintiff further states that said defendant is intending to grade said street down many feet below its present grade, and then to erect large and permanent buildings in the said Front street directly between the property of plaintiff and the Mississippi river, and so to occupy permanently for a private use the highway so dedicated by said act of Congress, and thereby to interfere with the use of the street by the plaintiff and the public in passing from its said premises to the Mississippi river, and, unless enjoined and restrained by this court, said defendant will cut down and change the grade of said street, and will also erect therein large and permanent structures, and will destroy the uses of the same as a public highway and thereby appropriate the same to private uses.

7. That if said defendant is allowed to change the grade and erect said structures as proposed, that it will greatly and irreparably damage the plaintiff in the use of its property, and for the injury plaintiff has no adequate legal remedy.

Plaintiff, therefore, prays that the said defendant may be enjoined and restrained from interfering with the grade of said street, and from in any manner obstructing the same by placing buildings therein, and thereby diverting the same from its use as a public highway for the uses of the public at large. That a temporary injunction issue restraining said defendant from proceeding therein, and that upon final hearing the same may be perpetual. That plaintiff may recover its costs, and for such other general relief as it may show itself entitled to upon the hearing.

Answer.

1st. The defendant for answer to the petition admits that plaintiff is a corporation, as stated, and also that it is the owner
4 of the lots claimed; and admits that it and its predecessor have made large and valuable improvements on said lots for the purpose of the manufacture of illuminating gas.

2nd. Defendant further states that said lots are located at or near the north end of Front street in said city, and at the foot of what is known as the North bluff, and that owing to the physical condition of the land under said bluff, Front street now and at all times has terminated in front of plaintiff's said premises, and never was prolonged further north because of the high bluffs west and north of said lots, making it impracticable to extend said street further north.

3rd. Defendant, further answering, denies that Front street extends from the east line of plaintiff's said lots to the Mississippi river, and in this behalf says that Front street is eighty feet wide, and that east of it is the strip, reserved by act of Congress for public use, and referred to in plaintiff's petition. That by congressional enactment all title and right of the General Government in and to said strip was conveyed to the city of Burlington, which now has the exclusive control thereof.

4th. Defendant admits that it is now upon said strip of land thus reserved for public use and that defendant is now engaged in excavating for a public highway, to the end that the public in general may have safe access to and from its present and proposed freight depot. That the condition of the surroundings and premises are these, viz: That about thirty feet east of the east line of plaintiff's premises a stone wall or support about seven feet high was some time ago erected as a retaining wall for Front street, said wall having been built by the Burlington & Northwestern railway, to protect its tracks located along the east side of said retaining wall, from caving earth; that what defendant is now doing, is to set said wall west fifteen feet in order that a wagon road might
5 be excavated and placed between said railroad tracks and said removed retaining wall for the exclusive use of the public, in having safe access to and from its present and proposed freight depot without crossing the railroad tracks.

5th. That defendant is not leveling the grade of Front street immediately in front of the premises of plaintiff, except to set back said wall as stated, and excavate between said removed wall and the railroad tracks; and that when said work is completed plaintiff will yet have at least twenty feet of wagon road and street untouched in front of its said lots and level with them; and that inasmuch as no part of Front street can be used north of its lots, the twenty feet left untouched will be ample and sufficient for plaintiff's private use, or the use of the public in reaching and leaving its said premises with wagons and teams, and that it now has access thereto from the south and west. That as the matter now stands, the north end of Front street is used exclusively for plaintiff's convenience, and it is of no use to the public except to reach its premises, and if the injunction prayed for is issued, it will in fact prevent the further and additional use of the public in said street, to gratify plaintiff's selfish wishes.

6th. That the city of Burlington, through the city council, has authorized the identical work which defendant is doing to be done; and the defendant has in every manner conformed to the requirements of said city, and the resolution adopted authorizing said work, as shown by the act of the city council, duly adopted November 10, 1892, which reads as follows:

"Resolved, That permission is hereby granted the Burlington, Cedar Rapids & Northern Railway Company to remove the earth and material, and set back the present retaining wall just north of High street, on Front street, fifteen (15) feet to a point twenty (20) feet east of the west line of Front street: Provided, however,
6 that the said company first enter into a satisfactory agree-

ment and undertaking with the city, to pay all expenses of removing said earth and material, the rebuilding of the retaining wall, the lowering and relaying of the water mains, and to save the city safe and harmless from all damage, costs and charges that may be incurred or accrue by reason of the doing said work, and that the space said wall is set back, to be used solely for the purpose of a public wagon road. Work under the authority herein granted, to be begun on or before December 15, 1892."

That under the law the said city has the right to control the public places and streets of said city, and determine the changes or alterations that the public necessities and convenience may require.

7th. Defendant denies the averment that it is about to build large and permanent buildings in Front street for its private use, and in this behalf avers that it does intend to build for the use of its railway and the public, a large and commodious freight depot near the Mississippi river north of High street, but said depot will not be located in Front street, but upon defendant's private grounds and property, or upon public property, and this excavation for the wagon road in question, and referred to in said resolution, is for the use of the public in safely reaching said depot without the danger of crossing the numerous railroad tracks now there located, and over which the public must necessarily cross in reaching the present freight depot.

8th. And defendant denies that in what it is doing under and by virtue of said resolution, that the uses of Front street will in any manner be destroyed, or appropriated for private use; and avers in this behalf that in truth and fact such improvement will greatly facilitate and aid the public in the uses of said street, and the
7 strip of land referred to as reserved for public use, and that unless the said work is permitted, the use of the public therein will be limited to the dealing with the plaintiff alone.

9th. Defendant denies that plaintiff ever had access to the river from said lots, except to pass south from said lots to High street, and that owing to the conformation of land and river embankments, it is the only access thereto; and defendant avers that the excavation of the highway referred to in said resolution will in no manner interfere with the plaintiff or the public in passing from and to said premises, from the Mississippi river or elsewhere; and that both will have the same privileges now enjoyed, and, in fact, the public rights and privileges will be greatly improved by the completing and extension of said street as contemplated in said resolution.

10th. Defendant denies that by doing said work, plaintiff will be greatly and irreparably damaged in the use of its property, and avers that it will sustain no damage whatever, and that if damage is in any manner entailed upon plaintiff by this public work, it will be such as can be adequately and speedily determined by a court of law, if damage is at all recoverable, and that equity has no jurisdiction to grant the injunction prayed for, and plaintiff's bill should be dismissed.

11th. And defendant now further answering specifically denies each and every other allegation contained in the petition not herein admitted; and it stands ready and willing to prove and maintain its averments, as this honorable court shall direct.

And now it having fully answered, prays to be dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

(The foregoing were all of the pleadings.)

8 Thereupon the plaintiff introduced the following evidence, viz: The following facts are agreed upon by the parties in writing, marked "Exhibit A."

"EXHIBIT A."

That the lots owned by plaintiff extend through from Front street to Main street, but that the grade of Main street is several feet above the level of said lots.

That the plaintiff first owned and built its gas works with suitable buildings thereon on lots 66 and 67, and that the principal part of the improvements situated upon said lots and lot 68, including buildings, gas-holders, coal-house, retorts and machinery of all kind necessary for the purpose of making gas, were put in with a view to the access to said premises by Front street, and that there now exists no convenient way of getting from the highway onto said lots excepting by way of Front street with wagons, teams, etc.

The most of said improvements were made with a view to the grade established in 1858, which grade was on a level, or a gradually ascending grade, as it now exists between the retaining wall mentioned in the pleadings and the east line of plaintiff's lot.

That Front street upon which said lots front, is a strip of land reserved by the act of Congress, of date July 2, 1836, and an act amendatory thereto of March 3, 1837, reserved for a public highway and other public uses, extending from the east side of plaintiff's lots to the Mississippi river.

That in pursuance of said act of Congress the city of Burlington was laid out and platted, and said street is shown upon the map of said city, and extends to north boundary of said city. A certified map of said plat will be introduced in connection herewith, and defendant will also introduce a map and photographs of the situation.

9 That whatever right passes to the city of Burlington giving it authority and control by the act of Congress of February 14, 1853 (United States Statutes at Large, vol. 10, page 157).

That there is no ordinance materially changing the grade of Front street from that of 1858, and the city has never undertaken to change the grade so as to authorize any interference with the present surface in front of plaintiff's lots.

That if the retaining wall is moved westward fifteen feet, that it will change the surface and make an excavation and a perpendicular bank where the wall is to be situated ten or twelve feet in height, and will reduce the width of the street remaining at regular grade in front of plaintiff's property to about twenty feet. That there is now such perpendicular bank, and the only effect of removing it is to reduce the width of that part of the street to the west, twenty and one-half feet thereof remaining at established grade.

That in making said improvements the purpose is to eventually erect a large building upon the strip of land reserved by Congress immediately in front of plaintiff's property, which will be a permanent structure for a public freight depot, and directly between the plaintiff's lots and the Mississippi river, and will occupy entirely for the use of the defendant for a railroad depot, which is public in the sense that all railroad depots are public, the space to be covered by said building for said purpose and for about several hundred feet in length. Diagrams of the same will be introduced upon the hearing.

That the defendant has no right in said street, excepting such as it has derived from ordinances or resolutions passed by the city council of the city of Burlington, Iowa, and said acts of Congress,
unless they have a right by some decree of court which so far
10 as competent may be introduced. All resolutions and ordinances on that subject are referred to and made a part of this agreed statement, and may be introduced without being inserted.

That if said depot is erected for the purpose of receiving freight and shipping the same in the usual way, cars will have to stand and occupy the street in the ordinary way for the purpose of discharging freight and receiving the freight.

That the strip of land reserved by the act of Congress extending east from the plaintiff's lots to the Mississippi river is now some two hundred feet in width, and is also by the action of the Mississippi river and by the accretions added thereto becoming wider.

That when the wall is removed as proposed, there will be left a space between it and the plaintiff's lots twenty feet nine inches in width, which will be the only part of Front street in front of plaintiff's premises which plaintiff will be able to use in passing to and from its lots to the other streets and the river.

That defendant now has its tracks laid on Front street in front of plaintiff's property, and has for many years used said street; that it has at this place — tracks which cover a space of — feet, the track farthest west lying within — feet of plaintiff's lots. That the present retaining wall was built several years ago by the Burlington & Northwestern railway for its convenience in laying its tracks aforesaid, and the street was cut down so that the present wall is now some — feet high and about perpendicular. That prior to the occupation of the street by defendant and the Burlington & Northwestern railway, there was a gradual descending grade from plaintiff's lots to the river across the strip of ground reserved by Congress, across which plaintiff could pass, to the river and other parts of the street.

11 Either party may introduce evidence of any other material facts.

Plaintiff also introduced a map, marked "Exhibit B."

William Steyh: I am city engineer and this map or diagram was made under my supervision.

I see on this map or diagram what is marked as the proposed new depot.

(It is conceded by the parties that the proposed new depot building will be two hundred feet long and thirty-five feet wide, the main brick part thereof being two stories high.)

This building will be located, as near as I can tell, from forty to forty-four feet east of the east line of the plaintiff's lots; between plaintiff's lots and the river there is a retaining wall; the railroad tracks are all east of this retaining wall; the first track east of the retaining wall north of plaintiff's lots is the Burlington & Northwestern Railway Co.'s tracks; then east of their track are the three tracks of the defendant railway company; in all four tracks between the river and this retaining wall.

W. A. Kendall: In connection with the brick building, as proposed for a depot, there will be a platform for receiving and handling freight connected with and north of the brick building, which will be one hundred and fifty to two hundred feet long; this platform will be permanent, having a foundation in the ground.

William Steyh, recalled by plaintiff: The distance from the east line of plaintiff's lot to the retaining wall, which is directly east of plaintiff's lot, is thirty-six feet; the water-works building is immediately north of the gas works, upon the next lot, as I believe, across
Arch street; Arch street is used past the water works and
12 past the gas works; Arch street runs east and west; in going
up to the water works people pass the gas works building.

Cross-examination:

The public do not use Front street north of the water works, not to my knowledge; the water works are located on lot No. 996 and a portion of 995; the reason the public cannot use Front street north of the water works is because it is occupied by railroad tracks, and the west side is a steep slope known as the bluff; this bluff, I should judge, would be from one hundred and two to one hundred and ten feet high above the railway tracks.

The elevation of the bluff at Spring street and Arch street is probably from fifteen to thirty feet high.

The public cannot use Front street north of the water works because of the bluff and the railroad tracks; these railroad tracks are located between the bluff and the Mississippi river; this retaining wall in question is two hundred and fifty-two feet long, and its height varies from four feet at the south end up to thirteen feet at the upper end; the average width of the street between the retaining wall and lots Nos. 67, 68 and 69 is thirty-six feet from the face of the wall; I do not know of any part of the public that uses Front street north of High street except for the purpose of reaching the water works and gas company; if the retaining wall is set back ten or fifteen feet, the access of the gas company to the Mississippi river on Front street would be just the same as it is now; they now have to drive south to High street to get to the river; if this retaining wall is set back as proposed, they will have to get to the river in the same way.

Lots 66, 67, 68, 69 and 70 are higher than the land east of this retaining wall; they are from twelve to fourteen feet higher at the highest point; when this wall is set back as proposed, there will
13 be no change of grade on Front street, except to diminish its width for the use of the plaintiff; while it diminishes plaintiff's use of it in that respect, it probably increases the public use of the street; as the situation now is the public cannot use the street east of the retaining wall on account of all the railroad tracks being located there.

Redirect examination:

I think the railway company, by reason of these tracks laid there, has destroyed the use of the street east of the retaining wall; the change of the retaining wall as proposed reduces the grade of that fifteen feet; it would be cut down to allow the wall to be set back fifteen feet; it reduces the surface of the street in that particular.

North of the water works, Front street cannot be traveled by reason of the railroads; if there were no railroads there Front street could be used; before the railroad was placed there, there was an old road there called the Toolsborough road around the bluff; there are no other railroads around the bluff except the defendant company, and the Burlington & Northwestern, that I know of.

Recross-examination:

Lot 70 is on the grade of High street, or nearly so; there is a brick building located on the west end of lot 70; on the east half of lot 70 there is no building to my knowledge.

E. D. CLEARY: I am the secretary of plaintiff; the gas works are situated on lots north of lot 70; they were built many years before the gas company owned lot 70; there is no access to lots 66, 67 and 68 from lot 70 on account of the gas-holders and buildings being situated so close together, so in driving in and out it would be impossible without tearing down the buildings at great expense to get out; we have no access to the gas lots except by Front street; it is quite necessary that we have access to our works by that street.

14 Cross-examination:

We haul coke and coal and material for repairs to our premises; we use a wagon for that purpose; the water company uses Front street as much as we do; nobody but the water company and ourself use it west of the retaining wall; we need this Front street to haul coal, coke and material for repairs; this gas-holder seems to interfere with the access through lot 70, which, I understand, is located on lots 68 and 69; you cannot drive across lot 70 to lots 68 and 69 and drive up to the works.

Redirect:

There is a sidewalk in front of plaintiff's lots on Front street; it is six or eight feet wide; if this excavation is made and the retaining wall removed west fifteen feet, there will only be some fourteen or fifteen feet of driveway left.

Richard Spencer: I am president of the plaintiff company; have been familiar with these lots for thirty two years; the gasholders and the buildings are upon lots 67, 68 and 69.

(Here plaintiff rests, and defendant introduced the following:)

W. A. Kendall: I am the general agent of the defendant; am familiar with the tracks and depot; it is necessary now to cross several railroad tracks to arrive at our present freight depot; these tracks belong to the defendant, and the Burlington & Northwestern owns one of them; the one the Burlington & Northwestern owns is nearest to the retaining wall; I know where the proposed new depot is to be located, and also the new tracks; it will not be necessary for the public to cross a railroad track to reach the proposed new depot; as the new depot is arranged the tracks will all be east of it, located between the depot and the river; the projected wagon road will run
alongside of the depot building, so that it will not be neces-
15 sary to cross any tracks. With reference to the present line
of the B., C. R. & N. tracks the proposed new depot will be put up to the west track as now located.

Cross-examination:

The Burlington & Northwestern is west of defendant; theirs is the west track; I know, as a matter of fact, the tracks are to be located east of the new depot; this is done to avoid having the public cross them.

Defendant here offers in evidence the resolution and action of the city council in the matter of the improvement contemplated as to setting back of this retaining wall; which proceedings are as follows:

Page 282, Record No. 17.

Whereas, the B., C. R. & N. Railway Co. contemplate the building of a large brick freight-house on its premises near the location of the present depot, which, as now located, is not sufficient to safely accommodate the public wants in delivering and receiving freight from such depot; therefore, be it

Resolved, That the right and authority is hereby granted said railroad company to remove the earth and material, and set back the present retaining wall just north of High street on Front street, a distance of thirty feet, so that safe access to and from said depot may be had by the public.

Referred to internal improvement and judiciary committees.

Page 292, Record No. 17.

Judiciary and internal improvement committees:

Reporting on the resolution of Alderman Hoerr granting privilege to the B., C. R. & N. Railway Co. to move the retaining wall on the north side of High street, find that if the wall is set back thirty feet access to the gas company's ground would be cut 16 off. If the wall be set back fifteen feet, access will be left and will leave a space of sixty feet between the wall and the east side of Front street, and recommend that the B., C. R. & N. Railway Co. be granted the privilege to move back the retaining wall fifteen feet from its present location, or to a point twenty feet east of the west line of Front street at their own expense, and to protect and hold the city harmless from any damage that might accrue by reason of the removal of said wall.

Adopted.

Page 371, Record No. 17.

Resolved, That permission is hereby granted the B., C. R. & N. Railway Co. to remove the earth and material, and to set back the present retaining wall just north of High street on Front street, to a point twenty feet east of the west line of Front street: Provided, however, that the said company first enter into a satisfactory agreement and understanding with the city to pay all expense of removing said earth and material, the rebuilding of the retaining wall, the lowering and relaying of the water mains, and to save the city safe and harmless from all damages, costs or charges that may occur or accrue by reason of the doing of said work. The space said wall is set back is to be used solely for the purpose of a public wagon road; work under the authority herein granted to be begun on or before December 15, 1892.

Adopted.

I hereby certify that the foregoing are correct copies of the records of the city council of the city of Burlington, Iowa.

Witness my hand and seal this 1st day of December, 1892.

[SEAL.] CARL VOGT,
City Clerk.

17 The plaintiff objects to this as incompetent, irrelevant, and immaterial, and averred that the city council had no right to do that.

Defendant here also offers in evidence photograph marked "Exhibit E."

The defendant here also offers in evidence the record in the case of The City of Burlington *vs.* B., C. R. & N. R. R. Co., heretofore pending in the circuit court of Des Moines county, Iowa, in 1879, which record is as follows:

Petition.

In the Circuit Court of Des Moines County, Iowa.

THE CITY OF BURLINGTON, Plaintiff,
vs.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY Co., Defendant.

The plaintiff states—

That it is a municipal corporation organized and existing under and by virtue of the general laws of the State of Iowa; that it is entitled to the immediate possession of the following-described real property, to wit: All that portion of the real estate within the city of Burlington, Des Moines county, Iowa, including what is commonly known as the "accretions" situated in the front of said city, east of the west line of Front street, between the south line of High street and the northern limits of said city; that the plaintiff is the absolute owner thereof in trust for the use of the public as a highway, and for other public uses; that the defendant unlawfully keeps the plaintiff out of possession of said premises, and prevents the same from being used as a public highway and for other public uses, not inconsistent with the use thereof as a highway; that the plaintiff has sustained damages by reason of the wrongful withholding of said property by the defendant in the sum of $1,000.

18 Wherefore plaintiff demands judgment for the immediate possession of said real property; that its title and estate be established against the adverse claims of defendant, and that said defendant be barred and forever estopped from having or claiming any right or title adverse to the plaintiff, or the public claiming by or through it in and to said premises, and for $1,000 damage and cost of suit.

(Signed) C. L. POOR,
Solicitor for Plaintiff.

Answer.

The defendant for answer denies that the plaintiff is entitled to the possession of the real estate mentioned and described in the petition and known as the "accretions," and denies that it unlawfully keeps plaintiff out of possession thereof, or prevents the same from being used as a public highway or other public uses; and denies that plaintiff is entitled to the sum of $1,000 for the wrongful withholding of said property by defendant; and specifically denies each and every allegation in the petition contained.

And defendant, further answering, states that it is the owner of the said "accretions," and is entitled to the possession thereof by virtue of a contract in the nature of an ordinance of the city of Burlington, Iowa, passed August 10, 1868, entitled "A grant to the Burlington, Cedar Rapids & Minnesota Railway Co. of river frontage from High street to the northern limits of the city," said ordinance being found on page 10 of the "Revised Ordinances of the City of Burlington, Iowa," a copy of which is hereto attached and made part hereof, marked "Exhibit A."

And defendant, further answering, states that by virtue of a decree
of foreclosure in the United States circuit court of Iowa
19 against said Burlington, Cedar Rapids & Minnesota Railway
Co., this defendant became the purchaser of all right, title
and interest of said Burlington, Cedar Rapids & Minnesota Railway Co. in and to their said railroad, and is now the absolute owner thereof, under such purchase, including all right said Burlington, Cedar Rapids & Minnesota Railway Co. had in and to said accretions; copy of which master's deed is hereunto attached, marked "Exhibit B."

Wherefore defendant prays judgment for costs.

(Signed) J. & S. K. TRACY,
Defendant's Attorneys.

Revised Ordinances, No. 5.

A grant to the Burlington, Cedar Rapids & Minnesota Railway Co. of river frontage from High street to the north limits of the city.

Articles of agreement, made and entered into, this 10th day of August, A. D. 1868, by and between the city of Burlington of one part, and the Burlington, Cedar Rapids & Minnesota Railway Co. of the other part,

Witnesseth: That the city of Burlington, party of the first part, in consideration of the permanent location of the car, repair and machine shops for the first division of the Burlington, Cedar Rapids & Minnesota railroad, within the corporate limits of the said city of Burlington, the said city of Burlington hereby grants unto said railway company, party of the second part, the right to use all that portion of real estate within the said city, commonly known as the "accretions" and situated in front of said city, between the south line of High street and the northern limits of said city.

The said Burlington, Cedar Rapids & Minnesota Railway Co.,
party of the second part, to have said real estate for depot grounds,
and for such other purposes connected with the business of
20 said company, as may be deemed advisable by said company
for the term of ninety-nine years, renewable forever.

That the said Burlington, Cedar Rapids & Minnesota Railway Co. hereby agrees to reclaim said real estate above specified and known as accretions, from its submerged condition, and to raise the grade thereof above high-water mark; and the right is hereby granted to said railway company to take and use the earth and rock from the bluffs north of Arch street, for the filling of said accretions, whenever the same can be done without encroaching upon the right of private property-holders.

It is further agreed between the parties aforesaid, that for the consideration of $13,000 in hand paid to said Burlington, Cedar Rapids & Minnesota Railway Co. by said city of Burlington, the receipt whereof is hereby acknowledged, the said railway company agrees to make a good, substantial wharf sixty feet wide, east of said depot grounds and along the whole river front from High street to the northern limits of said city; said wharf to be commenced within five days from this date, and completed on or before the 1st of January, A. D. 1880. Said wharf to be built for the use and benefit of said city of Burlington; and said city is to have the right to collect wharfage of all boats, rafts and water crafts, except the boats and water crafts belonging to said railway company.

It is hereby understood and agreed by the parties hereto, that the said railway company shall have the right to erect one or more grain elevators upon the wharf, to be built by said company, at such a point as may be selected by said company; and that the city of Burlington hereby reserve the right to regulate the speed of all locomotives and trains of said company within the corporate limits of said city.

21 It is further understood by the parties hereto, that the Toledo, Peoria & Warsaw, and the Carthage & Burlington Railway Companies shall have the right to use the aforesaid real estate granted to the Burlington, Cedar Rapids & Minnesota Railway Co., in common, for depot grounds for said companies, upon said railway companies each paying to the Burlington, Cedar Rapids & Minnesota Railway Co., a reasonable compensation to be fixed by three disinterested parties, to be appointed by the mayor for the time being of said city of Burlington.

It is also understood and agreed, that in further consideration of the right and privileges hereby granted by said city of Burlington to said Burlington, Cedar Rapids & Minnesota Railway Co., that said railway company shall forever keep and maintain its cattle and stock yards for this end of the road on the west side of the Mississippi river, at or near the northern limits of said city of Burlington.

In witness whereof, the parties have hereto set their hands and affixed their seals respectively, the day and year first written above.

(Signed) CITY OF BURLINGTON,
By A. W. CARPENTER, *Mayor.*

Attest:
J. S. HALLIDAY, *Recorder.*

For the Burlington, Cedar Rapids & Minnesota Railway Co.:
By GEO. GREEN, *President.*
JOHN H. GEAR,
CHAS. MASON,
JAMES PUTMAN,
Executive Committee.

Attest:
R. M. GREEN,
Sec'y B., C. R. & M. R'y.

Duly acknowledged.

22 *Demurrer. Filed* 1879.

The plaintiff demurs to the second count of the defendant's a
swer herein, and shows to the court the following grounds thereo
to wit:

1st. The said city council possessed no power to make any suc
contract as that under which the defendant claims title.

2nd. Upon the face of the contract set out in said count, it a
pears that the defendant could not by any means acquire any i
terest therein, or by virtue thereof gain any right to the real esta
in controversy.

3rd. It is not averred that the said Burlington, Cedar Rapids
Minnesota Railway Co., or the defendant herein, or any one for
on behalf of either of them has ever performed any of the acts
things to be done as the consideration for the use of said real estat

(Signed) C. L. POOR,
Solicitor for Plaintiff.

Answer and Cross-bill. Filed 1879.

And now comes the said defendant and by leave of court, fir
had and obtained, files this its amended answer, in the nature of
cross-bill to plaintiff's petition.

Defendant reaffirms all of the answer heretofore filed in th
cause, and avers further that it is the owner and holder of the re
estate in controversy in said suit, to wit: The accretions name
therein in northern part of said city; and became such by reason
said ordinance No. 5, mentioned and referred to in the answe
heretofore filed.

That defendant is also the owner of a freight-house used in con
nection with its business, located near said accretions on the rive
bank between the foot of High and Arch streets, at or nea
23 the termination thereof, which was erected more than te
years ago, and has been constantly and peaceably used dur-
ing such time by defendant and its grantors for the use and ben
efit of its railway.

That said company's railway tracks for the use and benefit of th
public, and for its convenience in operating its railway, are locate
on both sides of said freight-house, and a portion thereof is locate
on Front street between said freight-house and the west line o
Front street, and the same extend from the Union depot in Burling
ton to the northern limits of the city.

That defendant became the purchaser of said railway property, a
shown by exhibits attached to its answer herein filed, and, a
advised by council said city has no legal or equitable right to dis
turb defendant in its title, use and possession of said property; bu
so it is, the said city of Burlington wrongfully and inequitably ha
commenced its suit for the possession of said accretions and i
threatening to commence suit to eject defendant therefrom and from
the streets of said city thus occupied by its railway tracks.

Defendant, therefore, prays the court that this cause be transferred to the equity side of the court docket, and treated as a chancery case, and that defendant's right, title, and interest to said accretions and its railroad tracks, freight-house, etc., as aforesaid, be quieted and perfected as against said city, and that said city be perpetually restrained and enjoined from interferring with defendant in the use thereof, and in the use and operation of its railway thereby, and open final hearing of the matters herein set forth, defendant prays for such general and special relief as equity and good conscience demand.

(Signed) J. & S. K. TRACY,
Attorneys for Defendant.

24 *Agreement.*

In the Circuit Court of Des Moines County, Iowa.

THE CITY OF BURLINGTON, Plaintiff,
vs.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY CO.,
Defendant.

For the purpose of a final adjusting of all matters in controversy in the above suit, it is agreed that a decree shall be entered, quieting the title of defendant to the real estate in controversy; that defendant shall pay the sum of five thousand ($5,000) dollars for the purpose of constructing a public highway around the bluff in the northern part of said city, being an extension of what is known and recognized by an ordinance of said city, as the extension of North Main street; the said sum of money to be expended under the direction of the city council, and to be paid from time to time as the work progresses, upon the estimates for such work made by the city engineer of said city.

Upon the failure of said defendant to pay the amount of any estimate of engineer, for the purpose aforesaid, the plaintiff shall thereupon at its election, have the right to file a motion to set aside the decree entered herein, and the defendant hereby agrees that in any such case the said motion may be sustained, and the parties restored to the same condition and situation as before this agreement and the decree herein referred to had been filed. Filed March, 1879.

(Signed) J. TRACY,
Attorney for Defendant.
C. L. POOR,
City Solicitor.

25

Decree.

In the Circuit Court of Des Moines County, Iowa.

THE CITY OF BURLINGTON
vs.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

Now on this day this cause coming on for final hearing, plaintiff appearing by its attorney, C. L. Poor, and the defendant by J. & S. K. Tracy, its attorneys; and the court being fully advised in the premises as per agreement, stipulation of the parties made in open court, finds for the defendant and enters a decree accordingly.

1st. The defendant's right and title to the property mentioned and described in its amended answer and cross-bill, viz: the accretions in the northern part of said city, and being covered by ordinance No. 5, of the Revised Ordinances of the City of Burlington, 1877, page 156 thereof; and also its right and title to said freight-house and railway tracks, referred to in the answer, be and the same are hereby fully quieted and perfected as against said city.

2nd. That said railway company in consideration of the payment of $5,000 for the use and benefit of said city and the citizens thereof, to be used in the construction of a public highway on what is known and recognized by ordinance No. 3 of said city, as the extension of North Main street, and as contemplated by said ordinance, is hereby released from all real or supposed obligation resting upon it as the successor of the Burlington, Cedar Rapids & Minnesota Railway Co., under and by virtue of said ordinance No. 5 aforesaid. And said city accepts said $5,000 in lieu of the obligation of the building of the wharf as contemplated by said ordinance, and the location of the repair and machine shops and stock yards as therein mentioned.

26 3rd. Said city is to put the work of constructing said highway under contract at as early a day as practicable; the work to be done under the supervision of the engineer of said city, and to be paid for on the estimates of the engineer as the work progresses by said defendant; but the sum to be paid is not to exceed the sum of $5,000. The excavation of rock and earth not used in the construction of said road, is to be placed by the city on the east side of defendant's railway tracks north of the freight-house, at such point as defendant may designate most convenient to the point of excavation.

October 21, 1879.

(Signed)

CHAS. H. PHELPS,
Circuit Judge.

The foregoing was the evidence and all of the evidence with the exhibits introduced or offered in evidence, and duly certified as such by the court May 2, 1893.

Decree.

In the District Court of Iowa, in and for Des Moines County.

THE BURLINGTON GAS LIGHT CO., Plaintiff,
vs.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY CO.,
Defendant.

Now on this day this cause came on for final hearing, plaintiff appearing by Smyth, Rumple & Lake, its attorneys, and the defendant by S. K. Tracy, its attorney; and the evidence having been heretofore introduced, and the court having heard the argument of the counsel, and having taken the case under advisement and now being fully advised in the premises,—

27 Finds for the plaintiff, and that the charges contained in the petition of plaintiff are true, and that the plaintiff is entitled to the relief prayed for in its petition.

The court further finds that the defendant is intending to grade Front street in the city of Burlington, Iowa, in the manner as stated in the agreement of facts, and build a permanent structure thereon in front of the lots of the plaintiff for a freight depot, and that it has no legal right or authority to do the same.

That the city of Burlington was laid out and platted by the Government of the United States, and that the strip of ground in front of plaintiff's lots extending to the Mississippi river, was dedicated by said Government for a highway and other public uses, and marked and designated on the plat as Front street, and after such platting and dedication the lots of the plaintiff were sold by the Government, and through said sale by direct chain of title came to be the property of plaintiff, and that thereby the plaintiff acquired the right to have the same maintained as a street free from obstructions.

That plaintiff made its improvements on its lots according to the legally established grade, which has never been changed.

It is therefore considered, ordered and adjudged and decreed by the court that the defendant, The Burlington, Cedar Rapids & Northern Railway Co., and all persons acting by its authority, be and they are hereby perpetually restrained, enjoined and prohibited from in any manner disturbing the surface of said Front street in front of lots Nos. 66, 67, 68, 69 and 70, in the city of Burlington, Iowa, and from in any manner changing the surface thereof, and from alteration of the existing grade of said street.

28 It is further ordered, adjudged and decreed that the said defendant be and is hereby enjoined, restrained and prohibited from erecting upon said Front street in said city, between said lots of plaintiff and the Mississippi river, any buildings or erections, for depot purposes or otherwise, and from in any manner placing in said Front street any building of any kind, which will obstruct or interfere with the use of all portions of said street

as a street highway, between plaintiff's said lots and the Mississippi river.

It is further ordered that this injunction be and the same is hereby made perpetual.

It is further ordered, adjudged and decreed by the court that the plaintiff do have and recover of the said defendant the sum of $—, the costs and charges of this suit, to all of which the defendant excepted at the time.

Dated March 29, 1893.

(Signed) JAMES D. SMYTH,
District Judge.

Notice of appeal was duly and legally served on plaintiff and the clerk of said district court on May 5. 1893, and the clerk's fees secured.

S. K. TRACY,
Appellant's Attorney.

29 (Here follow photograph and map marked pp. 30 & 31.)

32 And said cause was duly submitted to said supreme court at the January term thereof on the foregoing record and arguments of counsel, and on the 26th day of May, 1894, said court filed its written opinion in the words and figures following, to wit:

33 Filed May 26th, 1894.

"BURLINGTON GAS LIGHT CO.
vs.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO., Appellant.

From Des Moines district court—Jas. D. Smyth, judge.

This is a suit in equity, by which the plaintiffs seeks to enjoin the defendant from making an excavation and erecting a wall and a freight depot in what is known as Front street, in the city of Burlington. The defendant answered the petition and there was a hearing on the merits, which resulted in a decree for the plaintiff. Defendant appeals.

S. K. Tracy, for appellant.

P. H. Smythe, for appellee.

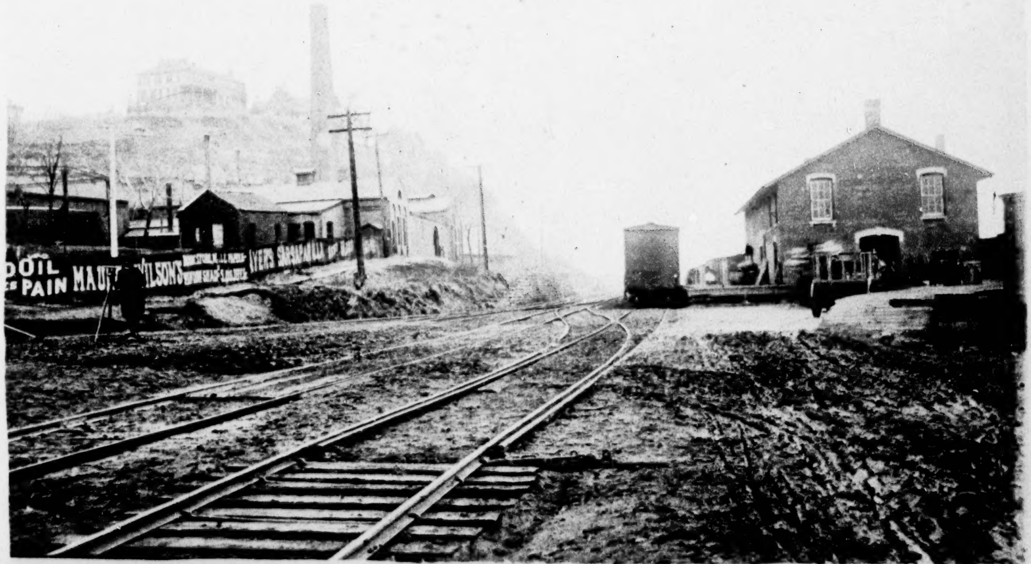
34 ROTHROCK, *J.:*

What is known as Front street in the city of Burlington is a strip of land bounded on the east by the Mississippi river. The plaintiff is the owner of five lots which abut on said street on the west, and said lots are occupied and used for the purpose of manufacturing gas to be used by the inhabitants of the city.

The land known as Front street is about two hundred feet in width opposite plaintiff's lots. The defendant and another railroad

No. 173
Burlington Gaslight Co. v. B. C. R. & N. R R Co. } p. 30

North



West

East

South

as a street highway, between plaintiff's said lots and the Mississippi river.

It is further ordered that this injunction be and the same is hereby made perpetual.

It is further ordered, adjudged and decreed by the court that the plaintiff do have and recover of the said defendant the sum of $—, the costs and charges of this suit, to all of which the defendant excepted at the time.

Dated March 29, 1893.

(Signed) JAMES D. SMYTH,
District Judge.

Notice of appeal was duly and legally served on plaintiff and the clerk of said district court on May 5. 1893, and the clerk's fees secured.

S. K. TRACY,
Appellant's Attorney.

29 (Here follow photograph and map marked pp. 30 & 31.)

32 And said cause was duly submitted to said supreme court at the January term thereof on the foregoing record and arguments of counsel, and on the 26th day of May, 1894, said court filed its written opinion in the words and figures following, to wit:

33 Filed May 26th, 1894.

"BURLINGTON GAS LIGHT CO.
vs.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO., Appellant.

From Des Moines district court—Jas. D. Smyth, judge.

This is a suit in equity, by which the plaintiffs seeks to enjoin the defendant from making an excavation and erecting a wall and a freight depot in what is known as Front street, in the city of Burlington. The defendant answered the petition and there was a hearing on the merits, which resulted in a decree for the plaintiff. Defendant appeals.

S. K. Tracy, for appellant.

P. H. Smythe, for appellee.

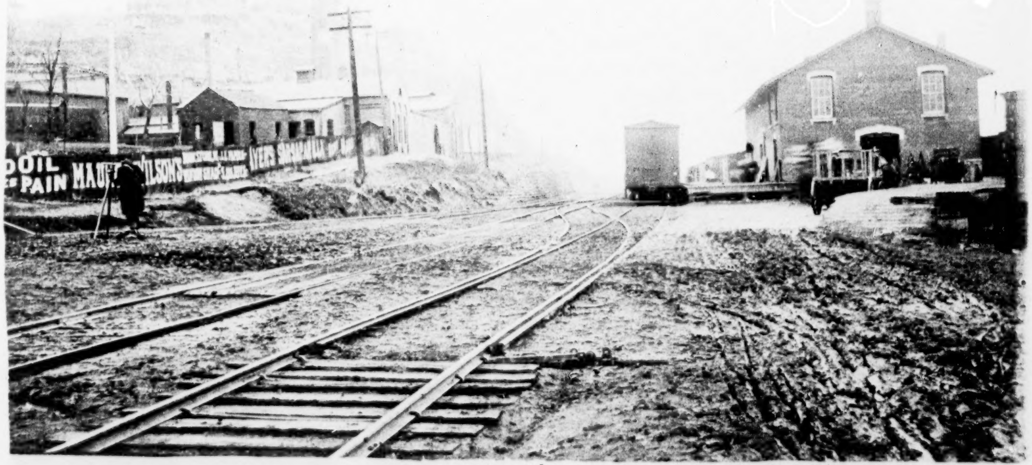
34 ROTHROCK, *J.:*

What is known as Front street in the city of Burlington is a strip of land bounded on the east by the Mississippi river. The plaintiff is the owner of five lots which abut on said street on the west, and said lots are occupied and used for the purpose of manufacturing gas to be used by the inhabitants of the city.

The land known as Front street is about two hundred feet in width opposite plaintiff's lots. The defendant and another railroad

No. 173
Burlington Gaslight Co. v. B. C. R. & N. R R Co. } p 30

North



West

East

South

company are occupying a part of said strip of land or street with railroad tracks and switches and a freight-house which is located between the railroad tracks and the river. The freight-house is located across the railroad tracks and opposite to the plaintiff's gas works. These tracks and the freight-house have been in use for a number of years. Before the railroad was graded the land in front of plaintiff's lots gradually descended towards the river and it was necessary to grade the railroad down to a level, which made a perpendicular cut of several feet, and a retaining wall was erected so as to sustain the bank and keep it in place. This wall is about thirty-six feet east of the line of the plaintiff's lots.

The plaintiff makes no complaint of this occupation of the street east of its lots. The cause of action is founded upon the fact that the defendant was about to remove the present retaining wall and widen the excavation of the street towards plaintiff's lots and build a new retaining wall about two hundred and fifty feet long and within twenty or twenty-one feet of the east line of said lots.

It appears that the defendant's purpose in making the excavation and removing the retaining wall east was to make space for a new freight depot which it intended to erect west of its railroad tracks.

The defendant claims that it has the right to make the proposed improvement because the excavation is for the purpose of not only making room for a depot, but also for making a wagon road, so that the public may safely transact business at said depot without
the danger of crossing numerous railroad tracks, and that it
35 has the right to do so because the strip of land is not exclusively a street, but may be used for other public purposes.

The plaintiff insists that the whole of the two hundred feet between its lots and the river is a public street, and that any obstruction upon said strip of land which impedes travel thereon is unlawful and may be enjoined. If this strip of land was originally set apart for the purposes of a street for public travel only, there would be force in the claim made by the plaintiff.

The city of Burlington was laid out in pursuance of an act of Congress passed July 2nd, 1836, in which it was provided 'that a quantity of land of proper width on the river bank at the town of Burlington and running with the said river the whole length of said town shall be reserved from sale (as shall also the public squares) for public use as public highways and for other public uses.'

By an act of Congress passed February 14, 1853, the title to said property was relinquished to the city of Burlington. It was held in the case of Cook *v.* The City of Burlington, 30 Iowa, 94, that 'the city took it for the same purposes for which the Government held it, subject to the same trusts and affected by the same conditions.'

The claim that this body of land, 200 ft. wide, can be devoted to no other public use than street travel cannot be sustained. It is expressly provided by the act of Congress that it shall remain forever for public use as public highways 'and for other public uses.' The fact that the land reserved was two hundred feet wide precludes the idea that it was intended for public travel alone. The Mississippi being one of the great navigable rivers of the United States, by which all the products of the country adjacent to it were removed to the market and goods, wares, and merchandise were received by the settlers, it ought not to be seriously contended that said land cannot be devoted to the purposes of facilitating and prosecuting the commercial interests of the public by such uses thereof as will accomplish the object for which it was intended.

36 The authorities cited by counsel for appellant have no application to such a dedication to public use as is made in the act of Congress under consideration. We need not cite the cases nor discuss their applicability. Not one of them are founded upon a dedication like this, either in the form of the dedication nor in principle.

But we do not hold that this land may be devoted to such 'other public uses,' to the injury and damage of the owners of lots abutting on this public land or street, and it appears to us that the only real question in this case is whether the plaintiff has shown that it has any real cause of complaint. It is difficult to explain the exact situation of the *locus in quo*. It is sufficient, however, to say that what is known as Front street has not been traveled north of the plaintiff's gas works for years. It cannot be traveled because of the railroad tracks and the bluffs adjacent to the river. The retaining wall now in front of the gas works prevents approach to the works from the east. The whole controversy narrows itself down to the question whether the plaintiff shall use a driveway thirty-six feet wide or one about twenty feet in width.

The question as to the right to change the grade of a street is much discussed in argument. The grade of the greater part has been changed already and presumably by the consent of the plaintiff, for no complaint is made of the retaining wall now in use. There is not one word in the evidence showing that the plaintiff would be damaged in any sum of money by the proposed change. It is true that there is evidence that there is no other means of driving in and out to and from the gas works, except by Front street, without incurring great expense in tearing down buildings, and it is claimed that twenty feet is too narrow for a driveway. To make it still narrower, it is suggested in argument, that allowance should be made for a sidewalk twelve feet wide. What demand there is for a sidewalk does not appear. It is conceded that there is no public travel at that point, and the thought that there is a necessity for a sidewalk twelve feet wide to accommodate any one ought not to be considered.

37 It appears to us that the case of Williams *v.* Carey, 73 Iowa, 194, is in principle very much like the case at bar. That was an action in equity by the owners of lots abutting on the west side of a street to enjoin the city of Des Moines from vacating twelve feet off of the east side of the street. It was held that a court of equity would not entertain the action because the damages to the plaintiff's lots were imaginary rather than *an* actual. In that case some of the plaintiffs testified as witnesses that each

lot owned by them would be $200 less in value if the street was narrowed as proposed; but this court found from other facts in the case that the said estimate of damages had no real foundation. Now, it may be said that the cases are different, because this is the changing of the grade of a street, and that was a vacation of the street. There is no real difference. We must presume that the present retaining wall was erected with plaintiff's consent and the street narrowed to that extent. The question now is whether the plaintiff's property will be diminished in value to any appreciable extent by redusing the width of the street or passageway as proposed. We find no evidence that such is the fact.

It may be proper to say further, in conclusion, that the city council of Burlington by a resolution authorized the defendant to set back the retaining wall, as proposed, provided it saved the city harmless from all damages that might accrue by reason of doing so, and that the space made by setting the wall back was to be used exclusively for a public wagon road.

It is said in Williams *v.* Carey, *supra*, that 'an abutting lot-owner cannot arbitrarily object to the vacation of a street or part of a street, nor can he upon slight grounds prevent the accomplishment of that which is a material benefit to the general public, and the conclusion of the city council will ordinarily, at least, be conclusive as to the question whether the vacation of a particular street is for the public good.'

It should further be stated that this part of the street has been to all intents and purposes vacated as a street for many years, except as an approach to the gas works and a way for the public to travel to and from the freight depot of the defendant; and we may 38 say further that even if the case be considered a change of the established grade of a street, we think there is no sufficient evidence of damages to maintain an action under section 469 of the code; that section of the code does not authorize any action or proceeding unless the alteration of the grade will 'injure or diminish the value of the property.'

We discover no ground upon which the injunction can be sustained, and the decree is reversed."

And, as of the same date, a final judgment and decree was entered in said supreme court, the same being in the words and figures following, to wit:

39 BURLINGTON GAS LIGHT CO.
v.
THE BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO., Appellant.

Decree.

Be it remembered that on this 20th day of May, 1894, the above-entitled cause came on to be heard, the appellee appearing by P. Henry Smythe, its attorney, and the appellant appearing by S. K. Tracy, its attorney, and the court having fully examined the evidence, and after reading the arguments of counsel and being fully advised in the premises, it is ordered, adjudged, and decreed that the issues are found for the appellant, The Burlington, Cedar Rapids & Northern Railway Company, and the injunction heretofore issued by the district court of Des Moines county in said cause be, and the same is hereby, dissolved, and the judgment and decree therein is reversed, and the plaintiff's bill is dismissed for want of equity, and that plaintiff pay the costs of this and the district courts, taxed at $78.90.

Copy of the foregoing accepted this 31st day of May, 1894.
(Signed) P. HENRY SMYTHE,
Att'y for Appellee.

The above decree is correct.
(Signed) JAS. H. ROTHROCK,
Judge Sup. Ct.

40 And on the 3rd day of September, 1894, there was filed in the office of the clerk of said supreme court a petition for writ of error for the removal of said cause to the Supreme Court of the United States, as well as the writ of error, bond, citation, and assignment of errors, true copies of which have been made and remain lodged in the office of said clerk, and the originals are hereto attached and transmitted herewith as a part of the return to said writ.

41 Filed Sep. 3, 1894. G. B. Pray, clerk supreme court.

In the Supreme Court of the State of Iowa.

THE BURLINGTON GAS LIGHT COMPANY
vs.
THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

The above-named plaintiff, The Burlington Gas Light Company, deeming itself aggrieved by the order and decree passed by the court at the May term, 1894, thereof, and claiming its right and title through and by virtue of certain acts of Congress, and desiring to have said decree and the record examined and passed upon by the Supreme Court of the United States, and the errors complained of corrected, now prays for the allowance of a writ of error by the chief justice of this court, and an order that the transcript of the record and proceedings, duly certified, may be transmitted to the Supreme Court of the United States for reasons set forth in the assignment of errors filed herewith.

P. HENRY SMYTH,
Attorney for Plaintiff and Plaintiff in Error,
The Burlington Gas Light Company.

Allowed August 31, 1894.
C. T. GRANGER,
Chief Justice Supreme Court of Iowa.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said *circuit* court, before you, between The Burlington Gas Light Company, as plaintiff, and The Burlington, Cedar Rapids and Northern Railway Company, as defendant, a manifest error hath happened, to the great damage of the said Burlington Gas Light Company, which claims its rights and title in its plea named by virtue of an act or acts of Congress, the construction of which were drawn in question, as by its complaint appears, and the decision was against the rights & title claimed under said statutes by said plaintiff, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal U. S. Circuit Court,
Southern District Iowa.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 31st day of August, A. D. 1894.

EDWARD R. MASON,
Clerk U. S. C. C., Southern District of Iowa.

Allowed.
C. T. GRANGER,
Chief Justice Supreme Court of Iowa.

Filed Sep. 3, 1894.

G. B. PRAY,
Clerk Supreme Court.

43 Filed Sep. 3, 1894. G. B. Pray, clerk supreme court.

In the Supreme Court of the State of Iowa.

THE BURLINGTON GAS LIGHT COMPANY, Plaintiff,
vs.
THE BURLINGTON, CEDAR RAPIDS AND NORTH- RAILWAY COMPANY, Defendant.

Know all men by these presents that we, The Burlington Gas Light Company, as principal, and Lyman Cook, as surety, are held and firmly bound unto the said Burlington, Cedar Rapids and Northern Railway Company in the sum of one thousand dollars, to be paid to the said railway company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our successors, assigns, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated at Burlington, Iowa, the 1st day of September, 1894.

Whereas the above-named Burlington Gas Light Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the decree of the supreme court of the State of Iowa, entered and passed in the above-entitled cause at the May term, 1894, thereof:

Now, therefore, the condition of this obligation is such that if the above-named Burlington Gas Light Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void;
44 otherwise the same shall be and remain in full force and virtue.

BURLINGTON GAS LIGHT CO.,
Per E. D. CLARY, *Sec'y.*
LYMAN COOK, *Surety.*

Sealed and signed in the presence of—
C. S. RICH.
W. J. SCHRAMM.

Approved by—
C. T. GRANGER,
Chief Justice of Supreme Court of Iowa.

44½ Filed Sep. 3, 1894. G. B. Pray, clerk supreme court.

In the Supreme Court of the State of Iowa.

THE BURLINGTON GAS LIGHT COMPANY, Plaintiff,
vs.
THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, Defendant.

Assignment of Errors upon which a Writ of Error is Prayed to Remove the Case to the Supreme Court of the United States.

Errors.

And now comes the said Burlington Gas Light Company, by P. Henry Smyth, its attorney, and says that in the record and proceedings aforesaid in the supreme court of the State of Iowa there is manifest error, in this, to wit:

I.

That by the record aforesaid it appears that *by* the decree aforesaid was given for the defendant (who was appellant in the said supreme court), The Burlington, Cedar Rapids & Northern Railway Company, whereas by the law of the land said decree should have been given for the said plaintiff, The Burlington Gas Light Company.

45

II.

Because—

The said record shows that the plaintiff, The Burlington Gas Light Company, had by virtue of an act of Congress such right in the street between its lots and the Mississippi river as entitled it to a decree restraining the defendant from obstructing said street with its proposed depot building, and it was error in the court to refuse this right and to reverse the decree entered & passed by the trial court in favor of plaintiff.

III.

It was error in the court to hold and decide that plaintiff was not entitled to the relief prayed for, and that the defendant had a right to occupy Front street, Burlington, by a permanent structure between plaintiff's lots and the river.

IV (4).

It was error in the court to hold and decide that the city council of the city of Burlington, Iowa, could surrender its control of the street in question to the defendant and authorize its obstruction, and in not deciding that the city held said street in trust, under the acts of Congress, and it was its duty to keep the same open for a street.

46

V.

The record and proceedings show that the street in question was reserved from sale by the Congress of the United States for the public as a highway, and that plaintiffs acquired a right by the purchase of their lots to have the same remain free from obstruction, and no right or power was ever granted to the city council of the city of Burlington or the defendant, The Burlington, Cedar Rapids & Northern Railway Company, to divert any portion of the same from its use as a street, and it was error in the court to hold that said street could be used by said defendant by the structure proposed to be erected on said street.

VI.

It was error in the court not to hold that plaintiff by said acts of Congress had acquired a right to Front street, between its lots & the river, as shown by the record, which entitled it to the interposition and decree of the court prohibiting the def't from obstructing said street in the manner shown by the record or in any way.

47 VII.

It was error in the court to place such construction upon the acts of Congress in question as it did in holding that plaintiff did not acquire such right & title under said acts as gave it the right to the injunction and relief prayed for in its bill, and in refusing to prohibit the defendant from invading said street and appropriating the same to uses inconsistent with the dedication made by the acts of Congress.

And the said Burlington Gas Light Company prays that the judgment and decree may be reversed by the Supreme Court of the United States and annulled & held for nothing, and that it may be restored to its rights in the premises.

P. HENRY SMYTH,
Attorney for said Burlington Gas Light Co.,
Plaintiff in Error.

[Endorsed:] Filed Sep. 3, 1894. G. B. Pray, clerk supreme court.

48 Filed Sep. 3, 1894. G. B. Pray, clerk supreme court.

THE UNITED STATES OF AMERICA, *ss:*

To The Burlington, Cedar Rapids and Northern Railway Company, Greeting:

You are hereby admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October, 1894, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein The Burlington Gas Light Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 7 day of Sept., 1894.

C. T. GRANGER,
Chief Justice of the Supreme Court of the State of Iowa.

Service of the above accepted Sept. 11th, 1894.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.,
By S. K. TRACY, *Gen'l Solicitor.*

49 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record, decision, and final judgment in a cause tried and determined in said court between The Burlington Gas Light Company, pl'ff, and The Burlington, Cedar Rapids & Northern Railway Co., def't.

And I further certify that true and correct copies of the petition for writ of error, the writ, bond, citation, and assignment of errors have been made, and the same are lodged in my office and the originals are hereto attached and made a part of this transcript and are herewith transmitted as a part of this return, and this return is made in obedience to said writ.

Seal of the Supreme Court of Iowa.

In testimony whereof witness my signature and official seal, at Des Moines, Iowa, this 12th day of September, 1894.

G. B. PRAY,
Clerk Supreme Court Iowa.

Endorsed on cover: Case No. 15,689. Iowa supreme court. Term No., 173. The Burlington Gas Light Company, plaintiff in error, *vs.* The Burlington, Cedar Rapids and Northern Railway Company. Filed September 24, 1894.

165-370

165-370

Office Supreme Court, U. S.
FILED.
DEC 16 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1896.

No. 173.

THE BURLINGTON GAS LIGHT COMPANY,
Plaintiff in Error,

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN
RAILWAY COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Brief for Plaintiff in Error.

By P. Henry Smythe.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 173.

THE BURLINGTON GAS LIGHT COMPANY,
Plaintiff in Error,

VS.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY,
Defendant in Error.

STATEMENT OF THE CASE.

The plaintiff in error is the owner of Lots numbered 66 to 70, inclusive, in the city of Burlington, Iowa. It was such owner for many years before this suit was brought. Upon these lots it has a plant for the manufacture of illuminating gas, the building and machinery being mostly on lots number 66 and 67. This plant was erected with all proper appliances for furnishing the city of Burlington with gas for illumination and other uses. The improvements with a view to the situation of the lots upon Front Street, which lies between plaintiff's lots and the Mississippi River, as shown by a diagram between pages 18 and 19 of the printed record herein.

The city of Burlington, Iowa, was laid out and platted by the United States Government, while the Government still held the title to the lands; and the lots owned by plaintiff in error were sold by the Government after the city was duly platted and a map thereof made by the commissioners appointed for that purpose, and the plaintiff in error derives its title by a direct chain from the Government under said sale. The official plat showed the lots as they appear in the diagram, fronting on Front Street, which street appeared upon the map by that name, and which extends along the river bank from the northerly to the southerly limits of said city as laid out.

The surveying, mapping and platting of said city, and the sale of lots thereunder, was all done under an act of Congress, passed July 2d, 1836, and an act amendatory thereto of March 3d, 1837. The act of 1836 contained this proviso:

> "*Provided further*, that a quantity of land of proper
> " width on the river bank at said towns and running with
> " said river the whole length of said towns shall be reserved
> "from sale (as shall also be the public squares) for public use
> " and remain forever for public use as public highways and
> " for other public uses."

Under these acts the commissioners, in making the plat of the city, marked upon the strip of land reserved from sale the name of *Front Street*, and afterwards the Government sold the lots now owned by plaintiff in error, fronting as is shown by the map, upon this street, which extends from the lots to the Mississippi River. From said lots to the river over this street was a gradual descending grade, furnishing easy access to the plaintiff's lots.

Sometime prior to the beginning of this suit the defendant and another railroad company had laid tracks in this street, and in doing so made an excavation in the street directly east of plaintiff's lots and within 36 feet of the same, thereby making a perpendicular cut and building a stone retaining wall to support the bank. The defendants claiming the right to do so, were proceeding to excavate said street from said wall towards plaintiff's lots, to within some 18 or 20 feet, then to rebuild a like wall, leaving a perpendicular obstruction several feet in height.

The ~~plaintiff~~ defendant was also proceeding to build on said Front Street, between the lots of plaintiff and the river, a large permanent brick building, to be used as a freight depot, 200 feet long and 35 feet wide, a part of it to be two stories high, to be used in the ordinary way.

It was claimed in their behalf that the city council of Burlington had licensed these acts and that it had authority and power to do so.

The plaintiff in error claiming and believing that, by the title acquired by it under the said acts of Congress and by the dedication of said Front Street it had an interest in said street, by reason of which it had the right to have it maintained as a street without such obstruction as said wall and said depot building, and to prevent its diversion from the uses to which it was dedicated, brought this suit in the District Court of Des Moines County, Iowa, which, on hearing, granted a perpetual injunction against the said acts threatened by the defendant. From that decree the defendant appealed to the Supreme Court of the State, where the decree below was reversed and the bill dismissed. Whereupon the plaintiff sued out this writ of error, assigning as error the ruling of the Supreme Court of the State, denying to plaintiff the relief sought, and which it claimed to be entitled to by virtue of certain acts of Congress, as fully set out in the assignment of errors appearing in the record.

BRIEF AND ARGUMENT.

The city of Burlington was laid off and platted by the Government, the acts of Congress material to the controversy being an act passed July 2d, 1836, United States Statutes at Large, Vol. 5, p. 70. This act provided for laying off and platting several towns on the Mississippi River besides Burlington. Among other things it provided as follows: *" That the tracts of land in the Territory of Wisconsin " (now Iowa) shall, under the direction of the Surveyor-Gen- " eral of the public lands, be laid off into town lots, streets, ave- " nues, and the lots for public use called the public squares, " and into out-lots, having regard to the lots and streets already " surveyed, etc., provided the tracts of land so to be laid off into " town lots etc., shall not exceed the quantity of one entire sec- " tion, nor the town lots one half an acre * * * . When " the survey of the lots shall be completed a plat thereof shall be " returned to the Secretary of the Treasury, and within six " months thereafter the lots shall be offered to the highest bidder " at public sale, under the direction of the President of the " United States, and at such other times as **he** shall think proper. " Provided, that no town lot shall be sold for a sum less than " five dollars "*

"And provided further that a quantity of land of proper "width on the river bank at the towns of Burlington (and "others), and running with the said river the whole length "of said towns, shall be reserved from sale (as shall also the "public squares), for public use, and remain forever for pub"lic use as public highways and for other public uses."

This was amended by an act passed March 3d, 1837,

U. S. Statutes at Large, Vol. 5, p. 178, the material part of which is:

> "Provided that the acts, etc., required to be done by the " surveyor under the act of which this is amendatory, shall "be done by a board of commissioners to be appointed by " the President."

Under these acts the town of Burlington was platted, the lots numbered, the streets designated and named, and the "quantity of land of proper width" on the bank of the river, was designated on the official map as *Front Street*, being the street now in controversy. It extended from plaintiff's lots to the river. Upon this survey and plat plaintiff's lots were sold by the Government, and through this grant the plaintiff's title was derived. It follows that whatever covenant existed between the Government and the original purchaser runs with the land and plaintiff is entitled to the benefits of the same.

The act of Congress providing for the survey of the city did not specify any "public uses" to which the land on the bank of the river should be dedicated, except that it should be used for a "highway," and then added "other public uses." But when the map was made,, and a plat of the streets and lots prepared by the commiss~~aries,~~ioners this land was designated on the map as "*Front Street.*" The making of the map, by virtue of the act of Congress, and designating the space between plantiff's lots and the river as a street, were as much a part of the dedication as the act itself; and the description of this land as a street left no room for cavil as to that particular purpose. No other public use was named. Therefore, the platting and sale of the lots fronting on the street at once created a covenant between the purchaser and the Government, that this space should always be held in trust by the Government or its assigns, not only as a highway, but as a street highway, extending from plaintiff's lots to the river. This being true it followed that by the dedication to other public uses must have been intended such uses, and such only, as were consistent with its use as a street.

Every person who purchased lots, therefore, fronting on said Front Street must be presumed to have purchased with a direct view to the very use, named and defined upon the plat, to-wit: a street; and upon the purchase there at once came into existence a covenant between the Government and such owner, that such street should, in the language of the Statute, "remain forever" for public use as a "street," and such other public uses as might be consistent with the use so expressed.

So the plaintiff in error, having purchased its lots fronting on the street, had a right to do so and to erect its plant and make its improvements upon them, relying on this covenant, and is entitled to the same protection and benefit as if it had been the original purchaser at the Government sale.

It is easy to see that as the map showed that Front Street extended from the lots to the river Mississippi, that such an advantage would naturally constitute a material part of the consideration. It has also been judicially settled that the fact that this street is liable to, and has, in fact, been materially widened by accretion from the action of the river, in no manner affects the rights of lot owners to the whole street. It was so decided by the Supreme Court of Iowa in the case of Cook vs. Burlington, 30 Iowa, p. 94. In that case it was held, and it is now the accepted rule, that the land added by accretion became a part of the street upon well recognized principles, and that the interest of the lot owner attached to the accretions the same as to the original street. Therefore, it will be seen that this widening of the space between plaintiff's lots and the river cuts no figure in arriving at a solution of the questions involved in the case. The plaintiff's rights are the same as if there had been no change in the width of the street.

There is another principle of law which is so well settled that it seldom affords a subject for discussion, and that is, the purchase of lots upon a dedicated street gives the purchasers and their successors a special interest in the street, different from that of the general public. It creates a special contract between the purchaser and the seller and dedicator, which constitutes a right of property. In the case at bar it was a solemn compact on the part of the Government that it would hold the street in trust for the use to which it was expressly dedicated. and this gives the lot owner a right of property in the street which justifies him in invoking the aid of a court of equity, when his rights are attempted to be disregarded by changing, diverting or obstructing the street.

This principle was approved by the Supreme Court of Ohio in the case of Street Railway Co. vs. Cumminsville, 14 Ohio St., 523. Judge Ranney (quoting from another case) uses this language in the case cited (p. 547): "The lot owners have a peculiar interest in the street which neither the local nor the general public can pretend to claim, a private right of the nature of an incorpor~~ated~~eal hereditament, legally attached to their contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement appendant to the lots "unlike any right of one lot owner in the lot of another, is as much property as the lot itself."

This decision is cited and approved by the Supreme Court of Iowa in the case of Cook vs. Burlington, 30 Iowa, 94, already referred to.

Judge Dillon, in his work on Corporations, Vol. 2, p. 277, Sec. 656a, 4th Edition, sums up the rule clearly and forcibly, giving a resumé of the authorities. We quote the section referred to:

> "The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have separately and in their relation to each other come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that he sought redress, and the discussion thence arising led to a more careful ascertainment of the nature of streets, and the rights of the adjoining owner in respect thereof. It was seen that in common with the rest of the public he had a right of passage. But it was further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it, and that these rights, whether the bare fee of the streets ~~are~~ was in the lot owner or in the city, were rights of property, and as such ought to be, and were as sacred from legislative invasion as his right to the lot itself."

This doctrine was shown to be supported by numerous authorities cited by Judge Dillon, and fully endorsed by him.

It was ably discussed and approved in the following decisions in the New York Court of Appeals.

Story vs. N. Y. Electric R. R. Co., 90 N. Y., 122

Mahony vs. Bushwick R. R., 91 N. Y., p. 148.

Lahr's Case ———— 104 N. Y., p. 268.

In the case last cited the rule laid down was vigorously assailed by eminent counsel in an effort to overthrow or modify the rule; but the effort only led the Court further in the true direction, the Court, on p. 289, using this language: "The "reasons advanced by the able counsel to induce us to recon-"sider that case (Story Case cited) seem to us to be insuf-"ficient to render it wise or expedient to do so. The doc-"trine of the Story case therefore, although pronounced by "a divided Court, must be considered *Stare decisis* upon all "questions involved therein, and as establishing the law as "well for this Court as the people of the State. Wherever "therefore, the principle of that case leads us, we feel con-"strained to go, and give full effect to the rule therein "stated."

Chancellor Wallworth, in Trustees of Watertown vs. Cowen, 4, Paige 510, gives expression to the principle in this language:

"Under such a covenant, the present owner of the lot "has a right to insist that the whole public square shall be "kept open."

The Supreme Court of Iowa said, in Warner vs. Lyons, 22 Iowa, p. 355:

"Nothing can be clearer than if a grant is made for a "specific, limited and definite purpose, the subject of the "grant cannot be used for another," again on p. 357, "so it "must be that if the right is vested in the city for a particular "purpose the legislature cannot vest it for another. When "the dedicator declared its purpose by the plat, the land can"not be sold or used for a different one. While the corpora"tion took the premises as trustee, they did so with the obliga"tion attached, as well as the rights conferred; the Legisla"ture might give the control of these squares to the cities, *"but it cannot authorize their sale for a use foreign to the objects "of the grant."*

I have italicised the last sentence of this quotation, because it touched upon any power claimed by Defendant in Error, on the part of the city to authorize a diversion of this street from the one expressed in the dedication, expressed by the Acts of Congress, and named upon the map by authority of these acts.

In Story vs. Railway Co., 90 N. Y., p. 167, the Court of Appeals used this language: "The grantees of the city, "by force of their grant, acquired the right to have Front "street kept forever as a public street; the street then be"came what is known to the common law as the servient "tenement, and the lots abutting thereon as the dominant "tenement, such servitude constituting a private easement "in the bed of the street, attached to the lots abutting thereon, "and passed to the Plaintiff as the owner of said lots." (Again p. 170) "the city undertook and agreed with Plain"tiff's grantors that Front street * * should forever "thereafter continue and be kept open as a public street "* * A covenant to keep a strip of land open as a public "street forever, is a covenant not to build thereon." "While "the legislature may regulate the use of the street as a street, "it has no power to authorize a structure thereon which is "subversive of and repugnant to the uses of the street as "an open, public street."

The same Court in Lahr's case, 104 N. Y., 291, in approving the previous decision, says: "The right which the "municipality acquires is limited by the public necessity, "and in this case cannot extend beyond its use for street pur-"poses." And on page 292, "the logical effect of the Story "case is to so construe the constitution as to operate as a re-"striction upon the legislative power over the public streets "* * and to confine its exercise to such legislation as "shall authorize their use for street purposes alone. When-"ever any other use is attempted to be authorized, it exceeds "its constitutional authority."

The authorities are quite uniform in support of these principles.

In Belcher vs. St. Louis, 82 Mo., 121, the rule came under review. On p. 125 we find this: "It is conceded, and "the authorities are all in accord on the subject, that when "private property is condemned or dedicated for one pub-"lic use, it cannot be appropriated to another and different "use." Quoting Malloy vs. R. R. Co., 26 Conn., p. 255, as follows: "When land is condemned for a special purpose, "on the score of public utility, the sequestration is limited to "that particular use."

The question in the Belcher case was whether the erection of an elevator on land dedicated for a public wharf was consistent with the dedication, and to be allowed. The Court held it was not, citing many authorities, and basing its decision upon two grounds: First, that such an erection woud be appropriating property dedicated for one purpose to another, and second, that it was anabandonment by the city of its control for municipal purposes over that part of the public wharf to be occupied.

It was distinctly held that the legislature could not confer the power on the city authorities to divert the property from the use to which it was dedicated, nor the power to abandon its control over it for that purpose.

The decisions of this Court are in perfect accord with the courts we have cited. It is only necessary to cite Barney vs. Keokuk, 94 U. S., p. 324. This case covers the whole ground, and sustains the view taken by the Plaintiff in Error when its bill was filed to enjoin the invasion of its rights in Front street.

I quote from the decision on page 340: "As to the "rights of the public in a city street, we see no difference in "regard to their rights, whether the fee is in the public, the "adjacent land owner, or some third person. In either case "the street is open and free for public passage, and for such "other public uses as are necessary for the city, and do not "prevent its use as a thoroughfare, such as the laying of water "pipes, gas pipes and the like, and according to the laws of "Iowa, improved iron ways for public passage, "which modern skill has devised, and which the advance of "general improvements require, such as horse railroads, etc," and by subsequent inventions may be added telephone poles and electric railway cars, etc. The Court then proceeds to consider the very point in this case in the following language: "Circuit Court is clearly correct in holding that "the construction of a permanent depot in Water "Street was an unauthorized and improper oc- "cupation of that street, it is a total obstruction of "the passage, and this, as we have said, cannot be created or "allowed. It is *subersive* of, and totally *repugnant* to the "dedication of the street, as well as to the rights of the pub- "lic."

Now the Plaintiff in Error insists that these principles were about to be violated by Defendant in Error, by the acts which it is conceded they were about to commit, when this Bill for an injunction was filed. By the holding of all the cases cited, the Plaintiff in Error by the purchase of its lots under the circumstances disclosed by the record, acquired a property interest in Front Street by which it had a right to insist upon its remaining forever free from any and every use which was not consistent with its use as a street. The Defendant in Error was proposing and intended to establish in this street a permanent obstruction in front of these lots in the shape of a perpendicular stone wall, after first destroying the gradual ascending grade of the street, several feet in height, directly in front of the lots, and some feet further easterly from this wall they were intending the erection of a permanent building, which was to occupy a space 35 feet wide, and some 200 feet long, the main structure to be of brick, and a portion of it two stories high, thus creating two impassable barriers, one within a few feet of Plaintiff's lots, and the other midway between the lots and the river, the effect being virtually to exclude all travel between Plaintiff's lots and the river, and thus practically to divert this part of the street from the purpose of the dedication, to other and utterly inconsistent uses. It logically follows that if the Defendant in Error can, under authority of the city or otherwise, thus destroy the street by erecting a perpendicular barrier near Plaintiff's lots, or by erecting a permanent building 35x200 ft. in the middle of the street, thus carving out a lot to be appropriated to a use which entirely excludes its use as a highway or street, that by the same power and right the whole street between Plaintiff's lot and the river might be farmed out to any use called public, and thereby totally subvert it from its use as a street. The space to be covered and occupied by the proposed building amounts to 7,000 square feet of land, bodily taken out of the street, directly between the lots and the river, and as completely withdrawn from the municipal control of the city, and from the uses of its dedication, as it would be if sold or leased to a private owner for a warehouse, a slaughterhouse, or storehouse, or any other strictly private use, and the authority which would justify that would also justify any other encroachments, even to the extent of the whole space.

The effect of this would be to appropriate the interest which Plaintiff acquired by the purchase of the lots to other uses, and thus destroy his property and deprive him of it without any compensation.

There is nothing in the record to justify the assumption of the Court below that Plaintiff in Error ever consented to the erection of the present retaining wall, or to any act which in any manner interfered with the use of the street. It will be seen that this wall is only a few feet in length, and does not extend the entire front of ~~Defendant's~~ the lots, and a failure to object to same would not estop Plaintiff from insisting on its removal subsequently.

The effect of the decision in the Barney case cited in this Court, and all the other cases, is that when land is dedicated to public use as a street, that many other public uses are impliedly included within the grant, but they are always limited to such uses as are *consistent* with the use *expressed*. Now, it seems not only clear, but incontrovertible,. that Plaintiff, by the purchase of the lots, acquired a special interest in the street, and if so, it must apply to the whole street, and such an interest as a court of equity will protect when it is threatened with invasion. Furthermore, that such interest is a part of the grant, and cannot be revoked by the grantor, nor by the authority of any legislative body. A court of equity, upon the showing made, presumes that the injury will result, that a violation of the covenant will not only cause a damage, but an injury which will be irreparable, and which cannot be measured by damages, so that no amount of money damages is necessary to be shown. The fact that a violation of the rights of Plaintiff is threatened or intended, is all sufficient.

II.

Let us see now what the Defendant in Error relies upon to avoid the force of these authorities, and the grounds given by the Supreme Court for reversing the decree passed by the District Court, granting a perpetual injunction.

The Court below in its opinion (p. 19 printed record) says: "If this strip of land was originally set apart for the "purposes of a street, only then would be force in the claim "made by plaintiff."

The act of Congress is then referred, and stress laid upon the language of the statute in which occur the words: "*other public uses*," but there is no attempt made to meet the reasoning of the authorities cited, except to say that "they are "not applicable." This would have been more satisfactory if the Court had pointed out some good reason why they were not.

It would seem that the cases cited included almost every conceivable character of dedication, and it is fully settled that every dedication of land for streets necessarily implies "other public uses," and when the dedication is for a street, then all other public uses must be consistent with that use. If it had been the intention to grant it to conflicting uses, it would have been so specified in the act itself. The Supreme Court seemed to have overlooked the fact that after the act was passed using the terms "other public uses," the commissioners made the plat, and in doing so designated this strip of land as a street, and this act is as binding on the dedication as the act authorizing it, and the contract between the government and the lot owner is that the street shall remain forever a public street, extending from the lots to the river. The width of the space affords no aid in reaching the intention of the grantors, as the express words exclude, necessarily, every use not consistent with that expressed. As was held in the case of Haight vs. Keokuk, 4, ~~and~~ Iowa, p. 199, it may be presumed among others were those necessary to facilitate shipping on the river, and might include wharfs, landings, the deposit of goods and wares temporarily in process of shipment, and such uses would be entirely consistent with the dedication to street purposes. Such was the line of reasoning by this Court in Barney against Keokuk, supra. In this case the land was described on the map as Water street. It was originally 100 feet wide, but at the time of the trial was found to be 250 feet wide, fully 50 feet wider than the record shows Front street to be in this case, and while it is not made to appear just how wide Front street was in 1837, the facts admitted show that it must have been considerably narrower, and that it has been, and is constantly increasing by the action of the waters of the river. The case already cited of Illinois Coal Co. vs. St. Louis 2d, Dillon p. 70, involved a wide strip of land on the river bank at St. Louis dedicated as a wharf, and the question was whether a permanent structure like an elevator for storing and shipping grain, was consistent with the dedication. Judge Dillon, on p. 83, says: "A "wharf differs in many material respects from a street. The "latter is intended for the purpose of passage or travel, and "any erection on it without legislative authority is a "nuisance."

All of the decisions are based upon these immutable principles: 1st, that the dedication and sale of abutting land constitutes an irrevocable covenant that the street shall always be preserved, and 2d, that the public authorities having control over the dedicated streets or highways cannot alienate any portion of them, nor surrender their power of control over them for the purposes of the dedication. In the case cited Judge Dillon uses this language (p. 87): "It "has been decided time and time again that power conferred upon municipal corporations for public purposes "cannot be either delegated to others, or surrendered or "renounced. * * They have no power as a party to "enter into contracts or pass ordinances which shall cede "any control, or embarrass their legislative or govermental "powers, or which shall disable them from at all times performing their public duties." In the footnotes of this decision there is a long list of decisions on the subject.

The powers of the City of Burlington in reference to the streets in question are all subject to these limitations. The U. S. Government, which reserved this street from sale, passed an act in 1853 vesting the legal title in the City of Burlington, but it did not undertake to give any authority to interfere with the existing rights of parties.

U. S. Statutes at Large, vol. 10, p. 157, provides as follows:

Section 2.—"And be it further enacted that there be "and hereby is granted to the City of Burlington * * "the land fronting on the Mississippi River in front of said "city, reserved by the act of 2d July, 1836, for a public high-"way and other public uses, together with the accretions "which may have been formed thereto or in front thereof, "to be disposed of in such manner as the corporate authori- "ties of such cities may direct."

Sec. 3.—"And be it further enacted that the grant made "by this act shall operate as relinquishment only of the right "of the United States in and to such premises, and shall in "no manner affect the rights of third persons therein, or to "the use thereof, but shall be subject to the same, etc."

It will be seen that the effect of this act was simply to transfer the legal title to this street to the city — charged with the same trusts and obligations as it was subject to in the hands of the Government—substituting the city to only such rights as were possessed by the United States after the dedication. The Supreme Court of Iowa, in the case of Cook vs. Burlington supra, especially so held. In the same case it held that the accretion to the street by the action of the river became a part of the street, charged with the same trusts as the street, and that the title and right of the lot owner to the part added by accretion was the same as the original street. Why the authorities we cited and quoted are not applicable, we are unable to perceive, nor how it can be supposed that "none of them are founded on a dedication like this in form "or in principle," as stated by the court below.

We have shown that the law implies in all dedications of streets, that they may be devoted "to other public uses," and this expressed declaration in the act gives no particular force in that respect. The fact that the street is now 200 feet wide does not affect the principle, and no authority has been or can be cited for such a position. The Barney case is in direct opposition to this holding, and the court below seemed to have entirely overlooked or ignored that decision. As before stated, the street there was 250 feet wide, while the building which obstructed it, which was a railroad depot, was only 20 feet wide, while here the building is to be, if tolerated, 35 feet wide, two stories high, and over 200 feet long. The space so occupied will be entirely diverted and confiscated, the authority of the city to exercise its municipal authority over it will be most thoroughly abrogated, and the occupancy as destructive to plaintiff's rights, and as complete as if the space had been sold for a slaughter house or a manufacturing establishment, or any other private use. The same may be said of the retaining wall. If that could be tolerated such walls might be built between the tracks occupied by the several roads, so that a passage from the lots to the river over such a corrugated highway would be impossible. The Court below is ready to presume that plaintiff consented to the present wall, without there being anything in the record to justify it except that it is there. And yet, although the Plaintiff shows that these obstructions will destroy the street in which it has a property interest; and that it has a large and valuable plant, all of which will be so affected that the injury cannot be measured by damages at law, the Court suggests that this does not enable it to presume that the plaintiff will be injured, and in the progress of this peculiar argument and support of the position, cites the fact that this street north of the Gas Works has not been used for years, while it appears that the reason for this is that the same has been destroyed by the railroads, the same as it seems to be intended to destroy it in front of plaintiff's premises.

It is hardly necessary to discuss the question of whether the Defendant in Error had acquired any sufficient authority from any source to justify its acts. The resolutions and ordinances of the City Council of the

City of Burlington give no such right, for the reason assigned in all of the decisions, that even the legislature has no power to divert land dedicated to the public, from the purposes of dedication, nor to destroy private rights in the land so dedicated. The record discloses no ordinance of the city undertaking to vacate said street, and no ordinance to that effect could be passed so as to affect Plaintiff's interests without acquiring that interest, either by the power of "*eminent domain*," or by purchase.

The record shows no attempt anywhere on the part of the city to authorize the erection of the depot or brick building complained of. The resolution of the City Council (p. 9, printed record) shows that they knew of the intention of Defendant in Error to do this, but the sole purpose of the resolution was to authorize the removal of the retaining wall. The resolution as introduced was not adopted, but a substitute (p. 10, printed record) which shows upon its face that the city did not claim the right to authorize this against the protest of the lot owner, but was a bare consent to the same so far as the city was concerned, and provided no interested party objected. This resolution gave no right to obstruct the street, even by the proposed stone wall. No other authority is attempted to be shown, unless we dignify with that name a certain record of the District Court of Des Moines County (p. 11 to 13, printed record) wherein the City of Burlington was Plaintiff, and the R. R. Co. Defendant in Error, was Defendant. This record was objected to by Plaintiff in Error as being incompetent and irrelevant, and it is sufficient to say here that it does not in any manner affect the rights of Plaintiff in Error, for the very satisfactory reason that it was neither a party to the suit, nor did any one appear for or represent it in the matters involved. It is unnecessary to cite authority to show that the rights of the Plaintiff in Error could not be affected, nor its rights in the street taken and disposed of in a case where it was not a party. But the Defendants in Error have claimed, and may here again, that the record in that case discloses an agreement between the city and the R. R. Co., which constitutes an authority. That agreement is subject to the same objection in this proceeding in court, and so far as Plaintiff's rights are concerned it is void. The purpose of that agreement was to alienate a large portion of the street for 99 years. The suit was brought seemingly for the purpose of avoiding that agreement, and was settled and a decree entered, without Plaintiff's knowledge or consent, and said settlement merged in the decree set out on page 16 printed record, but it is especially provided in the decree that the title awarded the Rail Road Company was only as to the right of the city. The authorities quoted show conclusively that the city had no power to surrender its control so as to affect the rights of lot owners, and its collusive agreement with the R. R. Co. in a suit in court could not give it any force or validity whatever.

The rights of the Plaintiff were secured to it by the contract of sale after dedication, and neither the legislature of the State nor the City Council could do any act to impair these rights.

The legislature of Iowa never passed any law authorizing railroads to destroy public highways, even by the power of "*eminent domain.*"

Section 1241 of McLain's Code, being sec. 1241 of Iowa Code, only authorizes taking for "right of way and wood "and water stations." Sec. 1907, McLane's Code, only authorizes roads already constructed to take additional ground for depot purposes after railway commissioners have examined the premises and certified the necessity. Sec. 2090, McLain's Iowa Code, provides for the formation of corporations for the purpose of building Union Depots, giving them power to use streets, etc., but upon the express condition that the damages to adjoining owners shall be ascertained and paid. So not only is it true that the legislature has no power to authorize the acts complained of by the Plaintiff in Error, but it has never attempted so to do. The tendency of the legislature has been in the opposite direction, for while the Supreme Court held in Milburn vs. Cedar Rapids, 12 Iowa, 266, that railroad tracks were only improved highways, and might be laid in streets as such, yet the legislature afterwards passed Section 464 of the Code, which is Section 623 McLain's Iowa Code, requiring all railways before using streets, even for tracks, to ascertain and pay damages to adjoining owners. What we have said in the last paragraph, we deem applicable to the fourth assignment of error, and the other part of the brief to the other assignments.

I therefore submit that according to unquestioned rules of law the Plaintiff in Error has an interest in Front Street, and a right to have it maintained forever as such street; that this right was and is as much property as the lots; that the right claimed was acquired by and through the acts of Congress referred to and those of the government done in pursuance thereof in platting the city and selling the lots; that the proposed acts of the Defendants in Error would be a direct invasion of these rights, and that in reversing the decree of injunction and dismissing the bill Plaintiff was denied the right granted to it by the United States; that the decree of the Supreme Court is erroneous and should be reversed, and the cause remanded for further proceedings consistent with Plaintiff's rights under the law. Respectfully submitted,

P. HENRY SMYTHE,
Counsel for Plaintiff in Error.

165-370

165-370

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 173.

THE BURLINGTON GAS LIGHT COMPANY,
Plaintiff in Error,

VS.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY,
Defendant in Error.

Petition for a Rehearing.

By Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 173.

THE BURLINGTON GAS LIGHT COMPANY,
Plaintiff in Error.

vs.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY,
Defendant in Error.

In behalf of the plaintiff in error I beg to suggest the following points as reasons why a rehearing should be granted in this cause:

I.

This suit is not based upon the claim, that the United States has any interest in Front street since the Act of 1853, but upon the claim that the City, by that Act, took the title, burdened with the same trusts and subject to the same uses, as those for which the United States held it, before said Act.

Cook vs. Burlington, 30 Iowa, 94;

United States vs. Illinois Central R. R. Co., 154 U. S., 225.

That by the dedication and purchase of its lots the plaintiff in error acquired a right which the State Court had denied, and therefore plaintiff in error has a right to maintain the action to protect its rights in this street.

II.

The Court seems to have entirely overlooked the fact that the Act of Congress, providing for this strip of land on the river bank, in which the words "other public uses" occur, only constitutes *part* of the *dedication* of the land in question; while the *Act* does not express the character of the highway, the plat made by the commissioners *does*. That plat, upon the faith of which the lots were purchased by plaintiff, says on its face, that the whole of this space is dedicated as *Front street*. The *Act* and the *plat* are *both* necessary to an understanding of the objects of the dedication. It would seem, in view of these facts, that a more proper reading of the Act would now be that this strip of land was intended by the words "highways" and the public squares, by those of "other public uses." At any rate, the lot owners had a right to rely on the plat as a covenant to keep the space open as a street, and not to allow its obstruction by permanent structures.

The fact that the space is now 200 feet wide, furnishes no solution to the question. The record shows that this space has been and is increasing by accretion since the sale of the lots, and was and is originally of irregular width, and the width does not help to interpret the purpose of the dedication.

The holding of the Supreme Court of Iowa, that the width of a street, laid out and dedicated as such, gives rise to a presumption that the dedicator intended something different from what the language means, and that it might be used for other purposes foreign to and in conflict with the purpose named, is a departure in jurisprudence and without a single authority, so far as we can find, to sustain it, and is, as we think, in direct conflict with the decision of this Court in the case of *Barney vs. Keokuk*, 94 U. S., 324, where this Court said:

> "*The Circuit Court is clearly correct in holding that the "construction of a permanent freight depot on Water street "was an unauthorized and improper occupation of that "street. It was the total obstruction of the passage, and "this we have said cannot be created or allowed; it is subversive of and totally repugnant to the dedication of a "street as well as to the rights of the public.*" (Our italics).

And yet Water street in Keokuk is *250 feet wide.* It was dedicated as a *street.* The space here in controversy is 200 feet wide and dedicated as a *street.* How can this decision be reconciled with the opinion in the case at bar? I submit that this holding is also in conflict with the decision of the Supreme Court of Iowa in *Warren vs. Mayor of Lyons*, 22 Iowa, 351, and other cases. Where it is distinctly held that "when the dedicator declared "his purpose by the *plat*, the land cannot be sold and "used for a different one." The plat is the *last* declaration and the one on which the purchaser of the lots has a right to rely. If the purpose can be changed by judicial construction, then the declaration of the plat is useless. The effect of the dedication of a street on the Mississippi river was passed upon in *Barney vs. Keokuk, supra.* But that holding does not go near so far as in this case, and is consistent with plaintiff's claims.

III.

Neither this Court nor the Supreme Court of Iowa has ever held that the streets of a city could be used for permanent buildings such as depots, etc. Nor have they ever held that such structures of railroads were a public use consistent with the uses of a street. The extent to which the Iowa Court has gone was to hold in the cases cited in *Barney vs. Keokuk,* 94 U. S., 341, that "railroads when located and con-"structed under municipal regulation and control, are "not regarded as obstructions to a highway in a legal "sense, nor as creating, when laid thereon, any injury "to the proprietors of the adjacent land."

They were treated as improved highways because *tracks* did not obstruct travel, but it was never held that they could do more than lay down tracks. And since these decisions, the legislature has interposed and changed the rule by passing Section 464 of the Code. Neither the statutes of Iowa nor the Supreme Court of Iowa has ever held that a permanent structure like a freight depot in the middle of a dedicated street was a public use consistent with the dedication until the present case, and both that Court and this, so far as they have passed upon the question, have held the opposite, and the effect of the present decision is to overrule the previously established law.

IV.

The question of pecuniary damage to plaintiff cuts no figure here, because the damage referred to by the Iowa Supreme Court was only in reference to changing the grade under an Iowa statute, and that question does not arise here. In the State Court the plaintiff claimed that the defendant was about to grade down the surface and change the grade from the one to which they had made their improvements and that this could not be done until plaintiff's damages were ascertained and paid under the statute. It was in answer to this claim, *and this only*, the Court said that plaintiff had not shown that it would "be damaged by "the *change*." This last word shows what the Court meant. It did not refer to the erection of this big depot or warehouse in the middle of the street for the purposes of land *navigation* alone.

V.

Another point I make is that the holding of the opinion, to the effect that plaintiff in error was not entitled to the interposition of a Court of Equity, although it may have had an interest in the dedicated street, is in conflict with both the decisions of the Iowa Supreme Court and of this Court, as I read them.

That in such case an adjoining owner was entitled to an injunction to prevent the diversion of the space dedicated we had supposed had become axiomatic. Such was the relief sought in the case of *New Orleans vs. United States*, 10 Peters, 662, where it was said in reference to the quay at New Orleans, "that this "common having been dedicated to public use, was "withdrawn from commerce and from the power of "the king rightfully to alienate it, has already been "shown, and also that he had a limited power over it "for certain purposes. Can the federal government "exercise this power? If it can this Court has the "power to *issue an injunction* or interdict to the sale of "any part of the common by the City, if the facts au-"thorize such an interposition." And the only reason the injunction did not issue, was that the Court found that the United States had no such interest as entitled it to bring the suit. The same doctrine was most forcibly announced and adhered to in the case cited in the opinion *United States vs. Illinois Central R. R. Co.*, 154 U. S., 225. Allow us to quote from page 338:

"Again, the sale of the lots was in law an effectual "dedication of the streets and public grounds for mu-"nicipal uses * * and the purchasers of the lots "acquired a special interest in the streets and public "grounds on which their lots abutted, and the United "States could make no disposition of them after the "sale, inconsistent with the use to which they had "been dedicated.

"The only parties interested in the public use for "which the ground was dedicated are the owners of "lots abutting on the ground dedicated, and the pub-"lic in general.

"The owners of abutting lots may be presumed to "have purchased in part consideration of the enhanced "value of the property from the dedication, and it "may be conceded they have a right to invoke through "the proper public authorities the protection of the "property in the *use* for which it was dedicated."

In this case, as in the other, the principles contended for were conceded to be sound, but the relief was denied solely upon the ground that the United States had no interest in the dedicated space which entitled them to maintain the action, they having parted with all their title to the State of Illinois.

But let us call attention to the fact that even on this proposition two of the Justices dissented and in the dissenting opinion Mr. Justice Brewer cited many authorities, including *Warren vs. Mayor*, 22 Iowa, 351, which fully sustains the right to an injunction, when applied for by a party having a special interest; but the dissenting opinion went much further than this, and contended that although the United States had parted with its interest, that as a dedicator it had a right to maintain a bill to enjoin the diversion of the land to other uses. There was no difference of opinion among the Justices of this Court in that case as to whether a party having a special interest entitling him to sue would be entitled to an injunction; that was conceded. No other or different holding has ever been announced by either the Supreme Court of Iowa or this Court, so far as we have been able to discover.

For an able exposition of the principles upon which the plaintiff in error based its claim for relief when this suit was brought, for which we cont6nd, we beg to refer to the dissenting opinion of Mr. Justice Brewer (in which Justice Brown concurred) in the case just cited, 154 U. S., page 242, and to the large list of authorities cited in that opinion, all concurring in the doctrine, which we think is applicable here. We beg also to suggest that the opinion in the case at bar overrules all of the decisions on this subject, if we rightly understand them. We do not think such was the intention, or that the Court had in view the establishment of a rule which would deny the right of injunction to persons interested in dedicated streets, to prohibit their diversion to other uses, yet we think this is the effect of the decision, and that it leaves the plaintiff in error, and every other lot owner, from one end of the City of Burlington to the other, in the position that if the whole street should be hereafter turned over to warehousemen, railroads and other business objects, and wholly enclosed and occupied so as to destroy it as a street, they would have no remedy.

We respectfully suggest, these considerations entitle us to a rehearing.

Respectfully submitted,

P. HENRY SMYTH,

For Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I, P. Henry Smyth, attorney and counsel for the plaintiff in error in the above entitled cause of the Burlington Gas Light Co. against the Burlington, Cedar Rapids and Northern Railway Co., do hereby certify that I am such counsel, and that I believe the points and suggestions made in the foregoing brief for a rehearing are well founded in point of law.

P. HENRY SMYTH,

Counsel for Plaintiff in Error.